1999

The State of Utah v. Norm Smith : Brief of Appellee

Utah Court of Appeals

IN THE UTAH COURT OF APPEALS

STATE OF UTAH, Plaintiff/Appellee, vs. NORM SMITH, Defendant/Appellant.	Case No. 990236-CA

BRIEF OF APPELLEE

AN APPEAL FROM CONVICTIONS FOR CARRYING A CONCEALED WEAPON, A SECOND DEGREE FELONY, IN VIOLATION OF UTAH CODE ANN. §§ 76-10-501, 504(3) (1995), AND TWO COUNTS OF AGGRAVATED ASSAULT, BOTH THIRD DEGREE FELONIES, IN VIOLATION OF UTAH CODE ANN. § 76-5-103 (1995), IN THE FIFTH JUDICIAL DISTRICT COURT OF UTAH, WASHINGTON COUNTY, THE HONORABLE G. RAND BEACHAM PRESIDING

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BRIEF OF APPELLEE

* * *

STATEMENT OF JURISDICTION

Defendant appeals from convictions for using a concealed weapon in the commission of a crime of violence, a second degree felony, in violation of Utah Code Ann. § 76-10-501, 504(3) (1995), and two counts of aggravated assault, both third degree felonies, in violation of Utah Code Ann. § 76-5-103 (1995).[1] This Court has jurisdiction under Utah Code Ann. § 78-2a-3(2)(e) (Supp. 2001).

STATEMENT OF THE ISSUES

1. Was defendant denied his Sixth Amendment right to call witnesses on his behalf and to confront the witnesses against him?

[1]Defendant has not challenged on appeal his conviction for interfering with a lawful arrest, a class B misdemeanor, in violation of Utah Code Ann. § 76-8-305 (1995). *See* Aplt. Brf.

Standard of Review. When reviewing a trial court decision to not allow a defendant to call a witness or to limit the cross-examination of a witness, the appellate court "review[s] the legal rule applied for correctness and the application of the rule to the facts for an abuse of discretion." *See State v. Chavez*, 2002 UT App 9, ¶ 17, 41 P.3d 1137 (reviewing a trial court's limit on cross-examination); *see also State v. Byrns*, 911 P.2d 981, 987 (Utah App. 1995) (reviewing for an abuse of discretion the trial court's finding that defendant had not demonstrated that a witness was material to the case under the Sixth Amendment).

2. Was the evidence sufficient to sustain defendant's conviction for carrying a concealed weapon in the commission of a crime of violence?

Standard of Review. The court affords great deference to the jury verdict and will not reverse a conviction unless "the evidence is so lacking and insubstantial that reasonable [minds] could not possibly have reached a verdict beyond a reasonable doubt." *State v. Lamm*, 606 P.2d 229, 231 (Utah 1980).

3. Did the trial court properly refuse to merge the aggravated assault charges with the concealed weapons charge?

Standard of Review. Whether the aggravated assault convictions should merge with the concealed weapons conviction is a legal question reviewed for correctness. *See State v. Bluff*, 2002 UT 66, ¶ 37, — Utah Adv. Rep —.

4. Was defense counsel ineffective for not requesting an instruction on threatening with a dangerous weapon as a lesser included offense of aggravated assault and was it plain error for the trial court not to give such an instruction sua sponte?

Standard of Review—Ineffective Assistance of Counsel. When a defendant is represented by new counsel on appeal and the record is otherwise adequate to review a defendant's claims of ineffective assistance of counsel, this Court will review those claims as a matter of law. *See State v. Chacon*, 962 P.2d 48, 50 (Utah 1998); *State v. Vessey*, 967 P.2d 960, 964 (Utah App. 1998). In evaluating an ineffectiveness claim, the Court "'indulge[s] in the strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.'" *State v. Templin*, 805 P.2d 182, 186 (Utah 1990) (quoting *Strickland v. Washington*, 466 U.S. 668, 689, 104 S.Ct. 2052, 2065 (1984)).

Standard of Review—Plain Error. Where a defendant raises an issue for the first time on appeal, this Court will not reverse a conviction based on that claim unless the defendant demonstrates plain error or exceptional circumstances. *See Bluff*, 2002 UT 66, at ¶ 25 *see also* Utah R. Evid. 103(d). However, this Court will not save the defendant from any alleged error if defendant made a conscious decision not to seek the relief or otherwise led the trial court into error. *See Bluff*, 2002 UT App 66, at ¶ 25.

5. Was defendant denied his Sixth Amendment right to effective assistance of counsel when his counsel did not move for a directed verdict at the close of the State's case on the ground that the State introduced no evidence that defendant did not have a concealed weapons permit?

Standard of Review. See standard of review for ineffective assistance under issue 4 above.

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The following constitutional provisions, statutes, and rules are relevant to a determination of this case and are reproduced in relevant part in Addendum A: U.S. Const. amend. VI; Utah Code Ann. § 76-1-402 (1995); Utah Code Ann. § 76-10-504 (Supp. 1995); Utah Code Ann. § 76-10-506 (1995).

STATEMENT OF THE CASE

SUMMARY OF PROCEEDINGS BELOW

Defendant was charged with using a concealed weapon during the commission of a crime of violence, two counts of aggravated assault, and interfering with a peace officer making a lawful arrest. R. 1-2. He was bound over for trial on all four counts at a preliminary hearing. R. 16-17, 20-21, 26-27. Although he was represented by court-appointed counsel,[2] defendant filed a plethora of pro se motions over the course of the next two and one-half years, most of which were denied. *See generally* R. 12-678.[3] Defendant's

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[2]Defendant had at least five different court-appointed attorneys. His original attorney, Douglas T. Terry, withdrew after defendant filed a bar complaint against him, R. 51, 54; Tom Blakely withdrew because he had previously been approached professionally by an individual involved in a property dispute with defendant, R. 61-62; Lamar J. Winward withdrew for unspecified reasons, but with defendant's express concurrence, R. 121-25; O'Dean Bowler withdrew after defendant sued him in federal court, R. 368-70, 373-75; and Kenneth L. Combs served as counsel through the trial, R. 422-23, 931-35.

[3]Pro se motions filed by defendant included, but were not limited to, motions asking the court to declare whether it was proceeding under common law, equity law, or maritime law, R. 12-13, 322-24, 493-99; an objection to the assignment of a magistrate for the preliminary hearing, R. 15; a motion to dismiss the case for an alleged illegal ex parte communication between the trial judge and defendant's counsel, R. 355-58; motions seeking the recusal of Judge G. Rand Beacham for alleged bias, R. 349, 391, 653; a motion to quash the affidavit of probable cause, R. 598-601; motions to dismiss based on disputed evidence, R. 185-86, 251-52, 318-19, 446-48, 512-16; motions to dismiss and

counsel also filed a motion to suppress evidence and to dismiss the case. R. 328-39. Those motions were denied. *See* R. 589, 615-22.

Following a five-day trial, a jury convicted defendant of all four counts as charged. R. 724-25; R. 933: 1156-57. Thereafter, defendant, through counsel, moved for judgment notwithstanding the verdict. R. 727-30. Defendant subsequently filed, pro se, an amended motion for judgment notwithstanding the verdict and a motion for new trial. R. 745-47, 751-73. Those motions were denied. R. 779-80. Following a 70-day diagnostic evaluation, R. 784-87, defendant was sentenced to one-to-fifteen years in prison for carrying a concealed weapon, zero-to-five years in prison for each aggravated assault conviction, and six months in jail for interfering with a lawful arrest. R. 829-31. The court suspended the sentence and placed defendant on supervised probation for 36 months, subject to a jail commitment of 60 days, the payment of a $2,000 fine, and various other conditions. R. 831-33. Defendant timely appealed. R. 835-36. The trial court has since terminated his supervised probation. R. 920 (located in manila envelope marked "Supp. Index & Pleading")

SUMMARY OF FACTS

Prelude

On the morning of April 9, 1996, defendant and his friend Clayton Call drove their motorcycles to a piece of property in Virgin, Utah to feed defendant's horses that were being

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suppress based on various other theories, R. 133-35, 162-64, 292-94, 297-302, 305-06, 309-10, 313-15, 361-63, 449-72, 483-92, 500-11, 517-20, 571-80; and motions for the appointment of an investigator, R. 30 (granted, R. 39-41), a legal researcher, R. 344-46, 537-39; a fingerprint expert, R. 270-71, 435-36 (granted, R. 613-14, 623), and an expert on police procedures and weapons, R. 586-87.

kept at the property. R. 933: 872; R. 931: 713. Defendant claimed that upon his arrival he discovered that his personal property there had been vandalized and that some of it was missing. R. 933: 872; R. 931: 714. Suspecting involvement by members of a family with whom defendant had been feuding over the property, defendant and his friend left to look for his missing property at Coal Pits Mountain. R. 933: 872-73; R. 931: 715. When Call's motorcycle broke down, defendant rode his motorcycle to the inn, owned by Call's mother and where defendant and his family were residing, to retrieve Call's automobile. R. 933: 872-73, 956-57; R. 931: 715-16. Before leaving the inn to pick up Call, defendant retrieved his pistol and placed it in a holster on his waist. R. 933: 874, 881. After defendant picked up Call, the two drove to a local bar where defendant telephoned his wife, directing her to report the incident to police. R. 933: 874; R. 931: 717-18. The two then returned to the property in Virgin between noon and 1:00. R. 933: 873; R. 931: 717-18, 781-82.

Defendant and Call stood guard at the property for the next several hours. R. 933: 963. During that time, defendant and Call retrieved several items from an underground cellar, including two rifles and boxes of ammunition which they placed in a partially-constructed building. R. 931: 783-84. After a few hours, defendant drove to a local bar to verify that his wife had called police. R. 933: 877; R. 931: 720. When he returned, he spoke to a couple of neighbors, including Ron Felton. R. 933: 1068. During the conversation, defendant declared that "the only good cop is a dead cop." R. 933: 1068. Some time before 4:00, defendant began pacing up and down the property and throwing dirt clods at Felton's home, prompting Felton's wife Sharon to call 9-1-1. R. 933: 1065.

The Standoff and Aggravated Assault.

Near 4:00 that afternoon, Call left in his car. R. 933: 959-60. However, when he saw that deputies from the sheriff's office were on their way up to the property, Call returned and notified defendant of their impending arrival. R. 933: 959-60; R. 931: 722-24. At about that time, Mrs. Felton observed defendant pull his shirt up and over his gun. R. 933: 1066-69. Shortly thereafter, Deputies Johnny Owen and Lorin Orvin from the Washington County Sheriff's Office pulled up to the property in their cars. R. 935: 271-75, 332, 500-02. After the two deputies exited their vehicles, Deputy Owen advised defendant that they had received a complaint he was brandishing a weapon. R. 935: 279. When Deputy Owen asked defendant if he had a weapon, defendant lifted up his shirt to expose his pistol and placed his hand on the butt of the gun. R. 935: 281-82, 323; R. 931: 520-21. Deputy Owen asked defendant to surrender the gun, but defendant refused, indicating that he was always arrested by police when they responded to a complaint. R. 935: 282-84, 323; R. 931: 524.

Deputy Call slowly moved toward defendant, repeatedly asking him to surrender the gun, but defendant backed away. R. 935: 283; R. 931: 522-25. Meanwhile, Deputy Orvin removed his gun from its holster and held it so that it was concealed from view. R. 931: 522-23. During the exchange, defendant was upset and agitated, which agitation gradually increased during the encounter. R. 935: 284. After a few moments and without provocation, defendant turned and ran to the partially-constructed building, entering through an open window frame. R. 935: 285-86, 305; R. 931: 525. The deputies pursued him, positioning themselves just outside two separate windows. R. 935: 305, 308, 312; R. 931: 526-27.

In the building, defendant attempted to hide the rifles in the building and concealed himself behind several garbage bins and other miscellaneous debris in the room. R. 935: 309, 318-19; R. 931: 527; R. 933: 892. The deputies tried to persuade defendant to surrender his weapon. R. 935: 309, 312; R. 931: 531. When defendant responded that he could shoot the officers, Deputy Orvin told defendant that although he may very well shoot one of them, the other would shoot him before defendant could shoot them both. R. 935: 309, 323; R. 931: 544. Defendant then dropped to his knees and pointed his gun directly at Deputy Orvin. R. 935: 310-11; R. 931: 531. Deputy Orvin immediately dove for cover under the window and radioed for additional assistance. At that point, Deputy Owen drew his weapon on defendant, who crouched further behind the garbage cans. R. 935: 310-11.

Defendant surrendered after several minutes of negotiation, putting the gun down on one of the garbage cans in front of him. R. 935: 313-14; R. 931: 532-33. R. 935: 314; R. 931: 533. After arresting defendant, Deputy Owen returned to the building where he retrieved defendant's pistol and the two other guns in the building, as well as the boxes of ammunition. R. 935: 315, 320-22; R. 931: 533. Defendant was thereafter transported to the jail in St. George for booking. R. 931: 545. After the booking process was complete, defendant acknowledged to Deputy Orvin that they could have shot him and thanked him for not doing so. R. 931: 545.

SUMMARY OF ARGUMENT

I. Sixth Amendment Right to Call and Confront Witnesses. Defendant contends that his Sixth Amendment right to call witnesses in his favor was violated when the trial court did not permit him to call Ron Felton to rebut the testimony of Sharon Felton. However, defendant did not ask to call Ron Felton to discredit Sharon Felton's testimony, but to testify regarding defendant's emotional state 30-40 minutes before deputies arrived. The trial court properly denied that request as irrelevant. Indeed, Sharon Felton had not yet testified when defendant sought Ron Felton's testimony. Because defendant did not ask that he be allowed to call Ron Felton to rebut Sharon Felton's testimony, his Sixth Amendment claim fails.

Defendant also contends that his Sixth Amendment right to confront the witnesses against him was violated when the trial court imposed a time limit on his cross-examination of Deputy Orvin. Reasonable time limits on cross-examination do not offend the Sixth Amendment. Where, as here, the defendant has had a reasonable opportunity to pursue the matters on direct and otherwise impeach the witness, his confrontation rights are not violated.

II. Sufficiency of the Evidence. Defendant claims that the evidence was insufficient to demonstrate that he intentionally concealed his weapon. Defendant's argument fails for several reasons. First, because the concealed weapons statute does not specify a mental state, the State was only required to show intent, knowledge, or recklessness. Second, defendant ignores the evidence that supports a finding of intentional

conduct. For example, Sharon Felton testified that although defendant usually wears his shirt tucked in, he pulled it up and over his gun just prior to the deputies' arrival.

Defendant also argues, for the first time on appeal, that the statute requires that the concealed weapon be concealed during the commission of the crime. However, any error here, if any, cannot constitute plain error inasmuch as no appellate decision has interpreted the statute's requirement. In any event, the statute is reasonably read to only require that incident to a crime of violence the weapon is later exposed and used during the commission of the crime.

III. Merger. Defendant argues that the aggravated assault convictions should merge with the conviction for the offense of using a concealed weapon during the commission of a crime. However, applying the analysis set forth in *State v. McCovey*, 803 P.2d 1234 (Utah 1990), this claim fails. The second degree felony offense is an enhancement statute, different in nature than other criminal statutes. Moreover, a review of the statute and its purpose reveals that the legislature did not intend that aggravated assault and the other aggravating offenses merge with the concealed weapons conviction. To find otherwise would not only require the merger of aggravated assault, but also the merger of the greater offenses of rape, murder, and aggravated murder. Such a result stands against logic and reason and is contrary to the statute's deterrent purpose.

IV. Lesser Included Instruction. Defendant complains that the trial court did not give an instruction on threatening with a dangerous weapon, Utah Code Ann. § 76-10-506 (1995), as a lesser included offense of aggravated assault. He argues that his counsel was

constitutionally deficient in not requesting the instruction and that the trial court's failure to give the instruction sua sponte was plain error. Under either theory, however, defendant's claim fails because a decision not to request such an instruction might properly be considered sound trial strategy. A defendant might rather risk a conviction for the greater offense, than risk giving the jury yet another theory upon which to convict him.

V. **Ineffective Assistance of Counsel.** Defendant argues that his counsel was ineffective for not moving for a directed verdict based on the State's failure to introduce evidence that defendant did not have a concealed weapons permit. However, because a motion for a directed verdict would inevitably have been followed by a motion to reopen the case, defendant can show no prejudice. Defendant admitted on cross-examination that he did not have a concealed weapons permit and implicitly admitted that fact throughout the proceedings. Accordingly, the State would have had little difficulty introducing evidence that defendant had no permit once the case was reopened.

ARGUMENT

I.

DEFENDANT WAS NOT DENIED HIS SIXTH AMENDMENT RIGHT TO CALL WITNESSES ON HIS BEHALF AND TO CONFRONT THE WITNESSES AGAINST HIM

In his first point on appeal, defendant lodges two complaints based on the Sixth Amendment to the United States Constitution. First, he complains that he was denied his Sixth Amendment right to call witnesses on his behalf when the trial court refused to permit him to call Ron Felton as a witness to discredit the testimony of his wife Sharon Felton. Aplt. Brf. at 17-19. Second, defendant complains that he was denied his Sixth Amendment right to confront the witnesses against him when the trial court imposed a time limitation on his cross-examination of Deputy Lorin Orvin. Aplt. Brf. at 19-23. Both claims fail.

A. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CALL WITNESSES IN HIS FAVOR.

Defendant "asserts that he was denied [his Sixth Amendment] right to call Ron Felton in his behalf to contradict Sharon Felton's testimony." Aplt. Brf. at 19. Because defendant never asked to call Ron Felton to contradict Sharon Felton's testimony, his claim fails.

After defendant rested, the State called Sharon Felton to rebut the testimony of defendant. *See* R. 933: 1061-70. During the State's case in chief, Deputies Owen and Orvin had testified that while defendant was barricaded in the building, he told the deputies that he could shoot them, R. 935: 309, or that "all you son-of-a-bitches should be dead," R. 931: 530. When defendant took the stand in his own defense, he denied making the remarks, explaining that his "father-in-law is a police officer and another gentleman that [he] dearly care[s] about

is a police officer and [he] do[es] not harbor those feelings." R. 933: 912-13. To rebut that claim, the State called Mrs. Felton. R. 933: 1061-70. She testified that in a conversation with her husband and another neighbor some 30 to 40 minutes before the deputies arrival, defendant remarked that the "only good cop is a dead cop." R. 933: 1068.

Although defendant later asked that he be allowed to recall Clayton Call to rebut Mrs. Felton's testimony, he did *not* ask that he be allowed to call Ron Felton to rebut that testimony as now claimed. *See* R. 933: 1106-09. Having failed to seek the rebuttal testimony at trial, he cannot now complain on appeal that the trial court erred in refusing to permit the witness to testify. *See State v. Emmett*, 839 P.2d 781, 783-84 (Utah 1992) (observing that defendant must "raise claims at the appropriate time at the trial level, so the trial judge has an opportunity to rule on the issue"); *State v. Lee*, 633 P.2d 48, 53 (Utah 1981) (holding that "an appellate court will not rule on grounds not addressed in the trial court").

Defendant correctly notes that earlier at trial, after the State rested its case, he asked that he be allowed to call Ron Felton as a witness in his case. *See* R. 931: 673. However, contrary to defendant's claim on appeal, he did not seek to call Mr. Felton to rebut Mrs. Felton's testimony—the State had not even called her as a witness at that point. *See* R. 935: 271-509; R. 931: 518-624. Rather, he wished to call Mr. Felton *to rebut testimony from Deputy Owen* that defendant was agitated during his later encounter with the deputies on Mrs. Felton's 9-1-1 call. R. 931: 673; *see also* 935: 284. The court, however, denied defendant's request to call Mr. Felton. R. 931: 674. Where Mr. Felton was not present

during defendant's encounter with the deputies, the court concluded that Mr. Felton's testimony would be "too attenuated" from the incident itself. R. 931: 674.

Defendant complains that Sharon Felton was eventually called by the State as a rebuttal witness and testified to that very issue. Aplt. Brf. at 19; *see* R. 933: 1068 (testifying that defendant "was very agitated. He was walking up and down the, the property with a gun."). By this time, however, defendant had taken the witness stand and testified that although he was "irritated" upon discovering that his property had been vandalized, any anger or irritation had dissipated earlier that day and he was "totally calm" by the time the deputies arrived. R. 933: 965-67, 979. Although the trial court had earlier ruled that evidence of defendant's emotional state earlier that day was not relevant, defendant later opened the door for the State to impeach his credibility and to rebut his evidence after defendant testified to his earlier emotional state. *Cf. State v. Squire*, 888 P.2d 1102, 1103-04 (Utah App. 1994) (holding that because defendant denied being a drug dealer and user, he opened the door for the State to introduce evidence of a prior conviction).

Moreover, the trial court acted well within its discretion in denying testimony about defendant's emotional state before the deputies' arrival. Although the Compulsory Process Clause of the Sixth Amendment grants a defendant the right to call witnesses in his favor, *see Rock v. Arkansas*, 483 U.S. 44, 52, 107 S.Ct. 2704, 2709 (1987),[4] that right is subject to

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[4]The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to have compulsory process for obtaining witnesses in his favor." U.S. Const., amend. VI. This right is guaranteed in State criminal prosecutions by the Fourteenth Amendment. *Rock*, 483 U.S. at 52, 107 S.Ct. at 2709 (citing *Washington,* 388 U.S. at 17-19, 87 S.Ct. at 1922-1923).

reasonable restrictions, *see United States v. Scheffer*, 523 U.S. 303, 308, 118 S.Ct. 1261, 1264 (1998). A violation of the Compulsory Process Clause does not occur unless "the defendant was arbitrarily deprived of 'testimony [that] would have been *relevant* and *material*, . . . and *vital* to the defense.'" *United States v. Valenzuela-Bernal*, 458 U.S. 858, 867, 102 S.Ct. 3440, 3446 (1982) (quoting *Washington v. Texas,* 388 U.S. 14, 16, 87 S.Ct. 1920, 1922 (1967)) (brackets and emphasis in original); *accord State v. Schreuder*, 712 P.2d 264, 274 (Utah 1985); *State v. Byrns*, 911 P.2d 981, 987 (Utah App. 1995).

In this case, the proposed testimony was neither relevant nor material. The State did not seek to demonstrate that defendant was agitated at any time prior to the deputies' arrival. *See* R. 931: 674. Nor did the State claim that defendant held a grudge against the deputies. Accordingly, whether defendant was agitated 40 minutes before their arrival has no bearing on whether he later threatened the deputies with his weapon. Moreover, defendant's own witness, Clayton Call, testified that defendant was angry and agitated. R. 931: 768, 774. And although defendant testified that he was totally calm by the time the deputies arrived, he acknowledged that he was "irritated" with the sheriff's office and its deputies "because [he] expected them to respond to [his] complaints [made earlier that day and on other occasions] and they hadn't come." R. 933: 964-65. In light of defendant's own testimony and that of Mr. Call, Mr. Felton's testimony was not material. That is, there is no "reasonable probability that its presence would affect the outcome of trial." *Schreuder*, 712 P.2d at 275. Defendant's claim must therefore fail.

B. THE TRIAL COURT DID NOT VIOLATE DEFENDANT'S SIXTH AMENDMENT RIGHT TO CONFRONT THE WITNESSES AGAINST HIM.

Defendant also contends that his Sixth Amendment right to confront the witnesses against him was violated. He generally argues that the trial court's time limitation on his cross-examination of Deputy Orvin violated his Sixth Amendment right to confront the witness. *See* Aplt. Brf. at 23. This contention also fails.

1. The Sixth Amendment Right to Confrontation.

The Sixth Amendment provides that "[i]n all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him." U.S. Const. amend. VI. The Confrontation Clause does not simply ensure the right of the accused to physically face those who testify against him, but it "'secure[s] for the [accused] the opportunity of cross-examination.'" *Davis v. Alaska*, 415 U.S. 308, 315-316, 94 S.Ct. 1105, 1110 (1974) (quoting 5 J. Wigmore, Evidence § 1395, p. 123 (3d ed. 1940)) (emphasis omitted). However, like the Sixth Amendment right to call witnesses, the Sixth Amendment right of confrontation "is not an absolute right." *State v. Moosman*, 794 P.2d 474, 479 (Utah 1990).

The Sixth Amendment right to confrontation only "guarantees an *opportunity* for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish." *Delaware v. Fensterer*, 474 U.S. 15, 20, 106 S.Ct. 292, 295 (1985) (*per curiam*) (emphasis in original). Thus, "trial judges retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness' safety, or interrogation that is repetitive or only marginally

relevant." *Delaware v. Van Arsdall*, 475 U.S. 673, 679, 106 S.Ct. 1431, 1435 (1986); *accord State v. Chavez*, 2002 UT App 9, ¶ 19, 41 P.3d 1137.

To prevail on a confrontation claim, the defendant must "show[ ] that he was prohibited from engaging in otherwise appropriate cross-examination designed to show a prototypical form of bias on the part of the witness, and thereby '[ ] expose to the jury the facts from which jurors . . . could appropriately draw inferences relating to the reliability of the witness.'" *Van Arsdall*, 475 U.S. at 680, 106 S.Ct. at 1436 (quoting *Davis*, 415 U.S. at 318, 94 S.Ct. at 1111); *accord Chavez*, 2002 UT App 9, at ¶ 18. The Seventh Circuit has articulated the inquiry on appeal as follows: The reviewing court must determine "whether the restrictions that the [trial] court imposed on the defendant's cross-examination deprived the defense of a meaningful opportunity to elicit available, relevant information that was likely to impeach the credibility of the witness." *United States v. Cameron*, 814 F.2d 403, 406 (7th Cir. 1987). In other words, "[a] restriction imposed on cross-examination 'does not violate the Confrontation Clause unless it limits relevant testimony and prejudices the defendant.'" *United States v. Marbella*, 73 F.3d 1508, 1513 (9th Cir.) (quoting *United States v. Shabani*, 48 F.3d 401, 403 (9th Cir. 1995)), *cert. denied*, 518 U.S. 1020, 116 S.Ct. 2555 (1996).

Although Utah courts have not addressed the propriety of imposing time limits on cross-examination, other jurisdictions have concluded that reasonable time limits do not offend the Sixth Amendment. *See, e.g., United States v. Rutgard*, 116 F.3d 1270, 1279 (9th Cir. 1997); *United States v. Vest*, 116 F.3d 1179, 1186-88 (7th Cir. 1997), *cert denied*, 522

U.S. 1119, 118 S.Ct. 1058 (1998); *Marbella*, 73 F.3d 1513 (9th Cir. 1996); *People v. Ducu*, 226 Cal.App.3d 1412, 1415, 277 Cal.Rptr. 464, 466 (Cal. App. 1991); *Heald v. State*, 492 N.E.2d 671, 678 (Ind. 1986). The Seventh Circuit observed that the trial court should always ensure that the defendant has had a "reasonable chance" to pursue the matters raised on direct and to otherwise impeach the witness. *See Vest*, 116 F.3d at 1186. Thus, any time limits imposed by the court should be treated "as guideposts rather than deadlines." *Id.* at 1187. Whether a time limit is reasonable depends on the particulars of each case, including the amount of time taken on direct, the complexity of issues involved, the productivity of cross-examination during the time given, the utility of further cross-examination, and even such "imponderables as the judge's assessment of the jury's comprehension and attention span." *See id.*[5] In other words, the trial court "must exercise judgment in deciding when the point of diminishing returns has been reached, or passed . . . ." *Id.* (internal quotations omitted).

2. Defendant Had Ample Opportunity to Cross-examine Deputy Orvin.

Defendant here has not demonstrated that the time limit imposed by the trial court was unreasonable or that it otherwise deprived him of an opportunity to conduct effective cross-examination. He does not identify what relevant matters he was precluded from exploring as a result of the time limitation, much less describe how he was prejudiced thereby. *See*

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[5]*See also Ducu*, 226 Cal.App.3d at 1415, 277 Cal.Rptr. at 466 (noting that trial court gave defense "at least as much time to conduct his cross-examination as he gave to the district attorney for direct"); *Marbella*, 73 F.3d at 1513 (noting that cross-examination had already undermined the witnesses' recollection of events and that additional questioning would be unproductive); *United States v. Malik*, 928 F.2d 17, 20-21 (1st Cir. 1991) (observing that the relevancy of the proposed additional cross-examination was not clear at the time of trial and its impeachment value was small in any event).

Marbella, 73 F.3d at 1513. His claim must therefore fail as nothing but a bald assertion. *See State v. Parra*, 972 P.2d 924, 926 (Utah App. 1998) (recognizing the well-established principle that "a reviewing court will not address arguments that are not adequately briefed"). A review on the merits also reveals that the trial court's time limit was reasonable.

Length of Direct Examination. The prosecutor questioned Deputy Orvin on direct for approximately 34 minutes over the course of two days. R. 688 (count 4:26 – 4:41); R. 682 (count 8:49 – 9:08). Defendant then cross-examined Deputy Orvin for approximately 50 minutes before the trial court ordered a recess. *See* R. 682-83 (9:25 – 10:15); R. 931: 583.[6] During the recess, the court advised defendant that he would be permitted to cross-examine Deputy Orvin for an additional 30 minutes. R. 931: 583. The time allotted for cross-examination of Deputy Orvin was thus more than twice that used for direct examination.

Complexity of Issues. The 80-minute time period for cross-examination of Deputy Orvin gave defendant more than enough time "to elicit available, relevant information" designed to impeach the officer's credibility. *Cameron*, 814 F.2d at 406. The issues at trial were neither complex nor difficult to develop or present. Deputy Orvin was not required to explain complex procedures or provide special expertise. Like Deputy Owen, he simply recounted the events that transpired in the late afternoon of April 9, 1996. The jury was thus faced with the straightforward task of determining whether or not to believe the deputy's account of the incident.

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[6]The trial court remarked that defendant had questioned Deputy Orvin for the same amount of time as did the prosecutor, but included in that calculus the 17-minute discussion outside the presence of the jury on the admissibility of defendant's statement at the jail. *See* R. 931: 583; *see also* R. 682 (9:08-9:22); R. 931: 535-43.

Productivity of Cross-examination and Utility of Further Questioning. Although defendant explored some relevant issues during cross-examination, he spent needless time on issues that at best were only marginally relevant. The day before, defendant's cross-examination of Deputy Owen was dominated by questions of little to no relevance and persisted three times as long as the State's direct examination of him. *See generally* R. 935: 324-498; *compare* R. 687 (53 minutes: 10:09-10:31; 10:51-11:22), *with* R. 687-88 (162 minutes: 11:22-11:40; 12:04-12:22; 1:39-3:00; 3:30-4:15). To avoid a similar outcome, the court ordered a brief recess after 50 minutes of cross-examination of Deputy Orvin and instructed defendant that he would be limited to 30 more minutes of cross-examination. The court, however, indicated that additional time would nevertheless be permitted if defendant demonstrated that he had used the 30 minutes for relevant questioning and additional time was necessary to flesh out other significant matters. R. 931: 585.

During the first 50 minutes of cross-examination, defendant had explored a few relevant issues—e.g., the visibility of defendant's gun, the timing and circumstances of the assault, and a possible motive to frame defendant. *See* R. 931: 546-57, 576-83. However, he spent undue time probing into minutiae as he did the day before with Deputy Owen—e.g., asking for detailed explanations about the deputies' arrival on the scene, the layout of the property, the positions of the cars, the characteristics of the fence, and the types of animals on the property. R. 931: 558-75. During the next 30 minutes, he also explored a few relevant issues, including the details of defendant's retreat to the building, the brief standoff, and defendant's surrender, R. 931: 589, 592-97, 604-05, 610. He also elicited testimony that

Deputy Orvin's primary focus was on Clayton Call and Deputy Owen rather than defendant, R. 931: 586. However, notwithstanding the court's warning to use his time wisely, he used nearly half of the 30 minutes exploring matters of little to no relevance. For example, he asked Deputy Orvin to identify the color of defendant's holster and the color of the clothing worn by defendant and Call. R. 931: 587-88, 597-98. He quizzed Deputy Orvin on such picayune details as how close the deputy was to the building, R. 931: 604, the manner in which the deputy ducked down for cover when defendant pointed the gun at him, R. 931: 605-07, and the nature and relative positioning of the debris in the room where defendant was barricaded, R. 931: 598, 601-03, 611-12. He spent additional time revisiting the positions of the cars and the distances between those involved and the cars. R. 931: 589-92. Moreover, in an impermissible attempt to challenge the deputies' authority to be on the property, defendant elicited testimony from Deputy Orvin that defendant had ordered the deputies off the property as trespassers because they had no warrant. *See* R. 931: 607-09.

Time Limit Extended. After 30 minutes of cross-examination, the court told defendant that he had reached his time limit. R. 931: 613. However, the court did not insist on strict adherence to the time limit, but permitted defendant to ask additional questions concerning the details of his surrender. R. 931: 613-14. Only after it became evident that additional time would not result in relevant questioning did the trial court terminate cross-examination. As in *Vest*, the court's "decision to end cross-examination only after concluding that [defendant] was wasting time with repetitive [and irrelevant] questions shows the necessary particularized judgment necessary for limiting cross-examination." 116 F.3d at 1187.

In summary, because defendant covered the issues raised on direct, spending more than twice the amount of time on cross-examination as the prosecutor used on direct, and given the simplicity of the issues and defendant's insistence to focus on matters of little or no relevance, it cannot be said that the time limit "prevent[ed] the jury from making a discriminating appraisal of the witness' testimony." *Vest*, 116 F.3d 1188-89 (internal quotes omitted). Accordingly, the trial court properly concluded that defendant's cross-examination of Deputy Orvin had passed the point of diminishing returns and his claim on appeal must therefore fail. *See id.* at 1187.

3. The Trial Court's Refusal to Permit a Demonstration Using a Garbage Can Did Not Preclude Defendant from Eliciting the Desired Testimony.

Defendant contends, however, that he was denied his right to confront the witness when the trial court did not permit Deputy Orvin to step down from the witness stand and demonstrate, using a garbage can admitted as a demonstrative exhibit, how the gun was placed on the garbage can in the building. Aplt. Brf. at 21-22. The court's refusal to permit the demonstration did not violate defendant's right of confrontation for two reasons. First, the relevancy of the gun's positioning on the garbage can is not apparent and defendant has failed to explain any. Second, defendant was in fact permitted to elicit the desired testimony, albeit not in the manner he wished. *See Fensterer*, 474 U.S. at 20, 106 S.Ct. at 295 (holding that the accused is not entitled to "cross-examination that is effective in whatever way, and to whatever extent, the defense might wish"). The court permitted Deputy Orvin to explain how the gun was laid down on the garbage can. *See* R. 931: 616. And when defendant again

insisted that a demonstration was necessary, the court permitted Deputy Orvin to so demonstrate on the witness stand. R. 931: 616 ("If you want to ask the witness in what position the weapon was laid I'll have him demonstrate that here."). The trial judge thus provided defendant with more than an adequate opportunity to demonstrate how the gun was laid down. A demonstration on the garbage can itself would have added nothing to the testimony. Defendant's failure to take advantage of that opportunity, insisting instead on a demonstration using the garbage can, R. 931: 617, cannot be attributed to the court.

II.

THE EVIDENCE WAS SUFFICIENT TO SUPPORT DEFENDANT'S CONVICTION FOR USING A CONCEALED FIREARM IN THE COMMISSION OF A CRIME OF VIOLENCE

Defendant next contends that the evidence was insufficient to sustain the jury's verdict that defendant was guilty of carrying a concealed weapon in the commission of a crime of violence. Aplt. Brf. at 23-25. Defendant's claim fails for two reasons.

First, defendant's claim fails because he assigns a greater culpable mental state for the offense than is required. Without citing any authority, defendant asserts that the State was required to prove that defendant "knowingly and intentionally" concealed the pistol. Aplt. Brf. at 23. However, because the concealed weapons statute does not specify a culpable mental state, *see* Utah Code Ann. § 76-10-504 (Supp. 1995), the State was only required to prove "intent, knowledge, *or* recklessness." Utah Code Ann. § 67-2-102 (1995) (emphasis added). Defendant's claim thus fails because he challenges only the sufficiency of the evidence with respect to an intentional mental state. He does not challenge the sufficiency

of the evidence with respect to a knowing or reckless mental state, either of which are sufficient for a finding of criminal liability.

Second, defendant's claim fails in any event because he ignores the evidence supporting a finding of intentional conduct. Although Deputy Owen testified that he did not believe defendant intentionally concealed the gun, he subsequently clarified that he did not believe defendant was intentionally concealing the weapon "as far as [he] could tell to start with." R. 935: 468. Moreover, Deputy Owen's belief at the time regarding defendant's mental state was speculative and not dispositive of the issue. Unless a defendant admits to his intention, criminal intent is not susceptible of direct proof and must "be inferred from the actions of the defendant or from surrounding circumstances." *State v. Murphy,* 674 P.2d 1220, 1223 (Utah 1983); *accord State v. Fixel*, 945 P.2d 149, 152 n.4 (Utah App. 1997) (observing that because "[t]here is rarely direct evidence of something as intangible as 'intent,'" proof thereof "is invariably a matter of inference to be drawn by the factfinder from all the evidence"). Thus, as against what any witness may testify, "it is the jury's privilege to weigh and consider all of the other facts and circumstances shown in evidence in determining what they will believe." *State v. Peterson*, 22 Utah 2d 377, 378, 453 P.2d 696, 697 (Utah 1969) (referring to a defendant's testimony).

Both deputies testified that the weapon was concealed under defendant's shirt when they arrived, R. 935: 281-82; R. 931: 520-21, and even defendant's own witness, Clayton Call, allowed that the weapon may have been partially concealed, R. 931: 726-27. Thus, where defendant openly admitted that he was carrying his gun in the holster, R. 931: 800, the

jury may reasonably infer that by wearing his shirt out, defendant intended that the gun be concealed. That evidence alone was sufficient to support a finding of intent. *See Peterson*, 22 Utah 2d at 378, 453 P.2d 697 (recognizing "the elementary rule that a person is presumed to intend the natural and probable consequences of his acts"); *accord State v. Sisneros*, 631 P.2d 856, 859 (Utah 1981).

Other evidence introduced at trial, ignored by defendant on appeal, was even more convincing of an intent to conceal. On direct examination by defendant, Clayton Call testified that defendant wore his shirts "[a]lways tucked in." R. 931: 731. Likewise, Sharon Felton testified that defendant normally wore his shirts tucked in and that defendant was in fact wearing his shirt tucked in on the day of the assault. R. 933: 1066-67. However, she testified that shortly before the deputies arrived, defendant pulled his shirt up and over his gun. R. 933: 1067-70. Where Clayton Call had just advised defendant of the deputies' impending arrival, *see* R. 933: 959-60; R. 931: 722-24, Sharon Felton's testimony that defendant pulled his shirt up and over the gun creates a strong inference that defendant intentionally concealed the weapon from the deputies. Accordingly, the evidence was not "completely lacking or [ ] so slight and unconvincing as to make the verdict plainly unreasonable and unjust." *State v. Heaps*, 2000 UT 5, ¶ 19, 999 P.2d 565 (*quoting Child v. Gonda*, 972 P.2d 425, 433 (Utah 1998)).

Defendant also asserts for the first time on appeal that because the assault on the officers did not occur until after he had exposed the firearm, the evidence was insufficient to demonstrate that he used the concealed firearm "in the commission of" the crime. Aplt.

Brf. at 24-25. As defendant acknowledges, he did not raise this claim below and must therefore demonstrate plain error. *See State v. Eldredge*, 773 P.2d 29, 35 (Utah 1989) (holding that appellants must show plain error on issues raised for the first time on appeal).

In essence, defendant argues that by its plain terms the statute requires that concealment of the weapon be contemporaneous with the commission of the violent crime. Under that logic, however, a concealed weapons offense can almost never occur if the concealed weapon itself is used to commit the crime of violence—some other instrument would have to be used. Such a reading of the statute is "unreasonably confused [and] inoperable." *State v. Chaney*, 1999 UT App 309, ¶ 45, 989 P.2d 1091 (internal quotes omitted). To the contrary, a reasonable reading of the statute presumes that the concealed weapon is subsequently exposed to commit the crime of violence.

In any event, where, as here, "the trial court did not have the benefit of an appellate decision interpreting the statute's requirement," the error cannot be deemed obvious. *Eldredge*, 773 P.2d at 36; *accord State v. Ross*, 951 P.2d 236, 239 (Utah App. 1997) (holding that "a trial court's error is not plain where there is no settled appellate law to guide the trial court").

III.

THE TRIAL COURT PROPERLY REFUSED TO MERGE THE AGGRAVATED ASSAULT CONVICTIONS WITH THE CONCEALED WEAPON CONVICTION

Relying on Utah Code Ann. § 76-1-402 (1995), defendant next contends that the trial court erred in refusing to merge the aggravated assault convictions with the concealed

weapon conviction. Aplt. Brf. at 25-27. Defendant argues that "he could not have committed the second-degree felony concealed weapon offense without necessarily having committed the offense of aggravated assault.... because the second degree felony concealed weapon offense... requires that the concealed weapon be used in the commission of a crime of violence or in this case during the course of an aggravated assault(s)." Aplt. Brf. at 26.

Under section 76-1-402(3), a defendant "may not be convicted of both the offense charged and [an] included offense." Utah Code Ann. § 76-1-402(3) (1995). Accordingly, "a lesser included offense must be merged into a greater offense if the defendant could not have committed the greater without having necessarily committed the lesser." *State v. Fedorowicz*, 2002 UT 67, ¶ 59, — Utah Adv. Rep — (citing *State v. Wood*, 868 P.2d 70, 89 (Utah 1993), *overruled on other grounds by State v. Mirquet*, 914 P.2d 1144 (Utah 1996), and *State v. Shaffer*, 725 P.2d 1301, 1313 (Utah 1986)); *accord State v. Baker*, 671 P.2d 152, 156 (Utah 1983).

In *State v. Hill*, 674 P.2d 96 (Utah 1983), the Utah Supreme Court held that in determining whether a greater-lesser relationship exists between offenses requiring merger, the court must "compar[e] the statutory elements of the two crimes as a theoretical matter and, where necessary, by reference to the facts proved at trial." *Hill*, 674 P.2d at 97; *accord Fedorowicz*, 2002 UT 67, at ¶ 59.

In *State v. McCovey*, 803 P.2d 1234, 1237 (Utah 1990), the Utah Supreme Court added to the *Hill* analysis in determining whether a greater-lesser relationship existed between second degree felony murder and its predicate offense of aggravated assault. In that

case, the defendant was convicted of second degree felony murder and aggravated robbery. 803 P.2d at 1234. Because the aggravated robbery was the predicate offense of second degree felony murder, defendant argued that his aggravated robbery conviction should have merged with his felony murder conviction. *Id.*

Under the felony murder statute in effect at the time, a criminal homicide constituted murder in the second degree if the actor committed criminal homicide "while in the commission, attempted commission, or immediate flight from the commission or attempted commission of" certain specified crimes, including aggravated robbery. *See id.* at 1236-37. Applying the *Hill* analysis, *McCovey* observed that "[u]nder a strict theoretical comparison, aggravated robbery . . . . does qualify [as a lesser included offense] under . . . the felony murder rule." *Id.* at 1237. And under a factual comparison, "[i]t [was] undisputed that all elements of aggravated robbery were proven at trial and that [the defendant] was convicted of the crime." *Id.* It was likewise undisputed "that the murder took place during the commission of aggravated robbery." *Id.* The Court thus acknowledged that "under the *Hill* analysis aggravated robbery would be a lesser included offense of felony murder." *Id.*

Although aggravated robbery appeared to meet the requirements of a lesser included offense under the *Hill* analysis, the Supreme Court concluded that it was not a lesser included offense. In so concluding, the Court identified a third step for determining whether a greater-lesser relationship exists requiring merger—"a determination of whether the legislature intended aggravated robbery to be a lesser included offense of second degree felony murder." *Id.* at 1235. The Court concluded that "the Utah State Legislature did not intend the multiple

crimes of felony murder to be punished as a single crime, but rather, that the homicide be *enhanced* to second degree felony murder *in addition to the underlying felony*. *Id.* at 1239 (emphasis added).

In determining the intent of the legislature, the Court first "recognize[d] that enhancement statutes are different in nature than other criminal statutes." *Id.* at 1237. The Court also observed that "[a]ggravated robbery does not, by its nature, have overlapping elements with any traditional form of murder." *Id.* at 1237. Finally, the Court "consider[ed] the nature and purpose of the felony murder statute." *Id.* at 1238. The Court observed that one of the purposes of the statute was to dispense with the requirement of showing a culpable mental state where a death occurs during the commission of a felony. *Id.* However, the Court focused on another purpose of the statute—"to deter the use of force or weapons in the commission of a felony." *Id.* The Court reasoned:

> If a felon knows that a homicide committed during the commission of a felony, whether accidental or unintentional, will be treated as a first degree felony in addition to the underlying felony being committed, he or she will be less apt to use deadly force or dangerous weapons. Conversely, if the legislature intended to make the underlying felony a lesser included offense, then a felon could receive a two-for-one windfall by convincing the jury that the homicide was unintentional or accidental.

Id. at 1239. The Court concluded that the legislature could not have intended to create such a windfall. *Id.*

The Court acknowledged that its decision was in apparent conflict with *State v. Shaffer*, 725 P.2d 1301 (Utah 1986), which held that the aggravating offenses that enhance second degree murder to first degree murder are lesser included offenses of first degree

murder. *McCovey*, 803 P.2d at 1237-38. However, the Court in *McCovey* noted that first degree murder is distinguishable from second degree murder in that first degree murder is punishable by death or life imprisonment. *Id.* at 1238. As such, imposing a punishment for the aggravating offense would add nothing to the punishment. *Id.* In contrast, second degree felony murder carries a punishment of five years to life and the Court thus held that "it would not be needless or surplusage to consider the underlying felony as a separate offense." *Id.*[7]

As a predicate to the second degree felony offense of carrying a concealed weapon, aggravated assault has the "same or less than all" of the elements of the concealed weapons crime. *See* Utah Code Ann. § 76-1-402(3)(a) (1995); *McCovey*, 803 P.2d at 1237. Moreover, and as discussed above, all the elements of aggravated assault were proven at trial and defendant was thus convicted of both counts. As also discussed above, defendant used the concealed weapon in the commission of the aggravated assaults. Thus, under the *Hill* analysis alone, aggravated assault would be a lesser included offense of the second degree felony crime of carrying a concealed weapon. However, as in *McCovey*, resolution of the issue is not reached simply by a comparison of the elements under the *Hill* analysis, but "requires a determination of whether the legislature intended [aggravated assault and the other aggravating crimes] to be [ ] lesser included offense[s] of [carrying a concealed weapon in the commission of a violent crime]." *See McCovey*, 803 P.2d at 1235.

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[7]The Court also noted that in *McCovey* the victim of the robbery was the video store and the victim of the murder was a customer, whereas in *Shaffer* the victim of the robbery and the victim of the murder were the same person. *McCovey*, 803 P.2d at 1238. This distinction, however, bore no relevance to the Court's overriding conclusion that the legislature did not intend that the predicate offenses of second degree felony murder be considered lesser included offenses.

Section 76-10-504 makes it unlawful for a person to carry a concealed firearm without a valid concealed firearm permit. Utah Code Ann. § 76-10-504(1)(b) (Supp. 1995). The statute provides that it is a class B misdemeanor if the firearm does not contain ammunition and a class A misdemeanor if the firearm contains ammunition. Utah Code Ann. § 76-10-504(1)(b) (Supp. 1995). However, the statute enhances the offense to a second degree felony "[i]f the concealed firearm is used in the commission of a crime of violence as defined in Section 76-10-501, and the person is a party to the offense." Utah Code Ann. § 76-10-504(3) (Supp. 1995). Thus, like the second degree felony murder statute considered in *McCovey*, the second degree felony provision for carrying a concealed weapon is an enhancement statute, "different in nature than other criminal statutes." *See McCovey*, 803 P.2d at 1237. Moreover, just as "[a]ggravated robbery does not, by its nature, have overlapping elements with any traditional form of murder," *Id.* at 1237, aggravated assault does not, by its nature, have overlapping elements with any traditional form of carrying a concealed weapon. These factors suggest that the legislature did not intend that the aggravating crimes be lesser included offenses of the enhanced concealed weapons offense.

Moreover, the general purpose of the concealed weapons statute "is to protect the public by preventing an individual from having on hand a weapon of which the public is unaware and which the individual might use should he be so inclined." *State v. Williams*, 636 P.2d 1092, 1094 (Utah 1981). A concealed weapon may pose varying degrees of danger depending on the circumstances. Undoubtedly recognizing this fact, the legislature designated three different levels of punishment depending on the risk posed by the

circumstances. For example, a concealed weapon containing ammunition represents a greater danger to the public than one without ammunition. Accordingly, a violation of the statute under the former circumstances is punishable as a class A misdemeanor rather than a class B misdemeanor. *See* Utah Code Ann. § 76-10-504(1) (Supp. 1995). And because the danger to the public increases exponentially when a concealed weapon is actually used in a crime of violence, the legislature made a violation of the statute a second degree felony under those circumstances. *See* Utah Code Ann. § 76-10-504(3) (Supp. 1995). As with felony murder, *see McCovey*, 803 P.2d at 1238, the legislature did not thus envision any lesser punishment for the predicate offenses. It simply sought to deter the more dangerous conduct by imposing a more severe punishment.

That the legislature did not intend aggravated assault to be a lesser included offense becomes apparent when the list of offenses that qualify as an aggravator under the statute is considered. Like aggravated assault, most of the predicate offenses under the statute carry equal or lighter punishments. *See, e.g.*, Utah Code Ann. § 76-5-205 (1995) (manslaughter), Utah Code Ann. § 76-5-105 (1995) (mayhem), Utah Code Ann. § 76-5-301 (1995) (kidnapping), Utah Code Ann. § 76-6-301 (Supp. 1995) (robbery), Utah Code Ann. § 76-6-202 (1995) (burglary), and Utah Code Ann. § 76-6-405 (1995) (extortion). However, murder, Utah Code Ann. § 76-5-203 (Supp. 1996), and rape, Utah Code Ann. § 76-5-402 (1995), are both first degree felonies, and aggravated murder, Utah Code Ann. § 76-5-202 (Supp. 1996), is a capital offense. If, as defendant suggests, the aggravating crimes for the enhanced concealed weapons offense are included offenses, then not only would the "lesser

included" offense of aggravated assault merge, but so would the "greater included" offenses of rape, murder, and aggravated murder. Surely, the legislature did not intend such a result, but intended to punish the underlying felony as well.

In summary, reason dictates that the legislature did not intend the multiple crimes of section 76-10-504(3) to be punished as a single crime, but rather, that the concealed weapon offense be enhanced to a second degree felony in addition to the underlying felony. *Cf. McCovey*, 803 P.2d at 1239) (using similar language in the context of second degree felony murder). Accordingly, the trial court did not err in refusing to merge the aggravated assault convictions with the second degree felony concealed weapon conviction.[8]

IV.

DEFENDANT HAS SHOWN NEITHER PLAIN ERROR NOR INEFFECTIVE ASSISTANCE OF COUNSEL FOR THE LACK OF A LESSER INCLUDED INSTRUCTION ON THREATENING WITH A DANGEROUS WEAPON

Defendant complains, for the first time on appeal, that the jury was not given an instruction on threatening with a dangerous weapon, Utah Code Ann. § 76-10-506 (1995), as a lesser included offense of aggravated assault. Aplt. Brf. at 28-29, 32-36. Because his attorney did not request an instruction for threatening with a dangerous weapon, and because the trial court did not give the instruction sua sponte, defendant rests his claim on both

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[8]Even if this Court were to conclude that an aggravated assault conviction merges with a second degree felony concealed weapons conviction, only one of the two aggravated assault convictions would merge. *See Wood*, 868 P.2d at 90 (observing that "it makes no sense . . . to merge both convictions when the law requires only one predicate offense").

ineffective assistance of counsel, Aplt. Brf. at 32-36, and plain error, Aplt. Brf. at 28-29. For the reasons explained below, defendant's claim fails.

A. INEFFECTIVE ASSISTANCE OF COUNSEL AND PLAIN ERROR ANALYSES.

Ineffective Assistance of Counsel. To prevail on a claim of ineffective assistance of counsel, defendant must meet the two-prong test established in *Strickland v. Washington*, 466 U.S. 668, 687, 104 S.Ct. 2052, 2064 (1984)). Under the *Strickland* test, defendant "must meet the heavy burden of showing that (1) trial counsel rendered deficient performance which fell below an objective standard of reasonable professional judgment, and (2) counsel's deficient performance prejudiced him." *State v. Chacon*, 962 P.2d 48, 50 (Utah 1998) (citing *Strickland*, 466 U.S. at 688, 104 S.Ct. at 2064) (other citations omitted). To prevail on a claim of ineffective assistance, "the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (citation omitted). A conviction will not be reversed for ineffective assistance unless "'there was a "lack of any conceivable tactical basis" for counsel's actions.'" *State v. Winward*, 941 P.2d 627, 635 (Utah App. 1997) (quoting *State v. Garrett*, 849 P.2d 578, 579 (Utah App. 1993) (quoting *State v. Moritzsky,* 771 P.2d 688, 692 (Utah. App.1989)); *accord Fernandez v. Cook*, 870 P.2d 870, 876 (Utah 1993) (holding that it will not find ineffectiveness unless there is "no reasonable basis" for making the decision).

Plain Error. "A party who fails to raise an issue with the trial court is generally barred from raising that issue for the first time on appeal unless the trial court committed

plain error." *Bluff*, 2002 UT 66, at ¶ 25. To establish plain error, defendant must show that "(i) an error was made, (ii) the error should have been obvious to the trial court, and (iii) the error was harmful, so that in the absence of the error, a more favorable outcome was reasonably likely." *State v. Helmick*, 2000 UT 70, ¶ 9, 9 P.3d 164 (citing *State v. Dunn*, 850 P.2d 1201, 1208 (Utah 1993)). Like an ineffectiveness claim, however, this Court will not save the defendant from any alleged error if defendant made a conscious decision not to seek the relief or otherwise led the trial court into error. *Bluff*, 2002 UT 66, at ¶ 25. The defendant, therefore, must not only demonstrate that the error was obvious, but also that the decision not to seek the relief "would serve no conceivable strategic purpose." *State v. Labrum*, 925 P.2d 937, 939 (Utah 1996).

B. Defendant Is Not Entitled to Relief Based on Ineffective Assistance of Counsel or Plain Error Because a Decision Not to Request a Lesser Included Instruction Is a Reasonable Tactical Choice.

In support of his claim of both ineffective assistance and plain error, defendant relies on the Utah Supreme Court's decision in *State v. Oldroyd*, 685 P.2d 551 (Utah 1984). Aplt. Brf. at 28-29, 32-33. However, in *Oldroyd* the defendant *asked* the trial court for an instruction on the lesser included offense of threatening with a dangerous weapon, but that request was ***denied***. ***Id.*** at 553. *Oldroyd* held that the court's refusal to give the instruction was error under the circumstances of that case. *Id.* at 554-56. *Oldroyd* did *not* address a failure to give the instruction where none was requested as is the case here and is therefore inapposite. Because this Court will not reverse a conviction based on ineffective assistance

or plain error where there is a strategic basis for counsel's decision, whether defendant was entitled to such an instruction is not at issue before the Court here.

It is in fact conceivable that the defense made a deliberate and tactical choice not to request the lesser included instruction. Defendant maintained throughout trial that he never aimed his gun at the deputies or otherwise used it in a threatening manner, but simply tried to remove it to comply with Deputy Owen's instructions. Thus, to acquit defendant of the aggravated assault charges, the jury must have believed defendant's account of the incident, and have completely disregarded the testimony of the deputies and Mrs. Felton. An instruction on the lesser included offense could have only provided the jury with another basis to render a guilty verdict, albeit a class A misdemeanor rather than a third degree felony, and would in all probability not have affected the jury's willingness to give credence to the deputies' testimony which established the aggravated assault. Therefore, the defense strategy of not requesting the jury instruction on the lesser-included offense of threatening with a weapon was suited to the defendant's theory of the case. It is also reasonable to believe that defendant would rather force the jury to choose between guilt and acquittal than risk giving the jury an option to "split the baby."

Because defendant has not demonstrated that a decision not to ask for an instruction on the lesser included offense "would serve no conceivable strategic purpose," both his ineffectiveness claim and his plain error claim fail. *Labrum*, 925 P.2d at 939 (applying plain error analysis); *accord Winward*, 941 P.2d at 635 (applying ineffective assistance analysis).

The apparent decision not to request the instruction neither constituted an unprofessional error, nor did it effect any demonstrably prejudicial impact on the outcome of the trial.[9]

V.

COUNSEL'S FAILURE TO MOVE FOR A DIRECTED VERDICT BASED ON INSUFFICIENT EVIDENCE DID NOT CONSTITUTE INEFFECTIVE ASSISTANCE OF COUNSEL

In his final point on appeal, defendant contends that his counsel was ineffective for not alleging as a basis for his motion for a directed verdict the failure of the State to introduce evidence that defendant did not have a concealed weapons permit. Aplt. Brf. at 31-32. As discussed above, to prevail on a claim of ineffectiveness, a defendant must not only show that trial counsel performed deficiently, but also that the deficient performance prejudiced him. *Chacon*, 962 P.2d at 50. Where, as here, "it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, . . . that course should be followed." *Strickland*, 466 U.S. at 697, 104 S.Ct. at 2069; *accord State v. Germonto*, 868 P.2d 50, 61 (Utah 1993)

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[9]Defendant also argues that the holding in *State v. Hill*, 688 P.2d 450 (Utah 1984) makes "the obviousness of the trial court's error [ ] even more apparent." Aplt. Brf. at 29, 33. As explained above, however, whether the law entitled defendant to the lesser included instruction, no matter how well-settled, is not the determinative issue when there is a sound tactical basis for not requesting the instruction. In any event, the Supreme Court has observed that "[t]he distinctions in levels of proscribed conduct [between aggravated assault and threatening with a dangerous weapon] are clear and easily to be comprehended." *State v. Verdin*, 595 P.2d 862, 862 (Utah 1979). At the very worst, it would appear that contrary to defendant's claim, the more specific statute is aggravated assault—which requires a specific threat to do bodily injury to another with a dangerous weapon, Utah Code Ann. § 76-5-103 (1995), not threatening with a dangerous weapon—which generally requires the display of a weapon in an angry and threatening manner or in a fight, *see* Utah Code Ann. § 76-10-506 (1995).

("reiterat[ing] that [the Court] need not address both components if a defendant fails to meet his or her burden on either one").

To meet the prejudice prong, defendant must demonstrate that "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." *Strickland*, 466 U.S. at 688, 694, 104 S.Ct. at 2064, 2068. Defendant contends that because the State introduced no evidence that he did not have a concealed weapons permit, the trial court "would have had to dismiss Count I because no evidence had been introduced by the State that he lacked a valid permit." Aplt. Brf. at 35. That contention, however, assumes that the State would not have been allowed to reopen its case and introduce the necessary evidence. The assumption is not valid.

Utah courts have long recognized that a trial court may permit the State to reopen its case to meet an insufficiency challenge. For example, in *State v. Gregorious*, 81 Utah 33, 16 P.2d 893 (1932), the defendant was charged with having committed an infamous crime against nature. The State rested its case after calling as its only witness an accomplice to the crime. *Id.* at 894-95. Citing the rule that a conviction could not be sustained based on the uncorroborated testimony of an accomplice, the defendant moved for a directed verdict for insufficient evidence. *Id.* at 895. Rather than granting defendant's motion, the trial court granted the State's request to reopen the case so that it could call a witness who could provide the corroborating testimony. *Id.* The Utah Supreme Court affirmed the conviction, holding that "[i]t was within the discretion of the court to permit the case to be reopened." *Id.*

In *State v. Lawrence*, 120 Utah 323, 234 P.2d 600 (1951), the State charged defendant with grand larceny, but failed to put on any evidence of the value of the stolen car. *Id.* at 325-26, 234 P.2d at 601. Rather than moving to reopen the case, the State asked the trial court to take judicial notice that the car's value exceeded the grand larceny requirements. *Id.* at 326, 234 P.2d at 601. The court denied the motion for a directed verdict and instructed the jury that it must "'take the value of this property as being in excess of $50.00 and therefore the defendant, if he is guilty at all, is guilty of grand larceny.'" *Id.* In holding that the trial court erred in so instructing the jury, the Supreme Court observed that "[t]he State's attorney might properly and with little difficulty have moved to reopen and supply the missing evidence." *Id.*

In *State v. Seel*, 827 P.2d 954 (Utah App.), *cert. denied*, 836 P.2d 1383 (Utah 1992), this Court also acknowledged the State's ability to reopen its case to introduce evidence necessary for a conviction. After the State rested, the trial court in *Seel* orally dismissed the possession of a firearm charge against the defendant because no evidence had been introduced that he knew the pistol was in the vehicle. *Id.* at 957. However, the court then granted the State's motion to reopen the case so that it could introduce the missing evidence. *Id.* After hearing the additional testimony, the court reinstated the firearm charge and the jury found defendant guilty. *Id.* at 957-58. On appeal, defendant argued that his right against double jeopardy was violated because the firearm charge had been dismissed by the trial court. *Id.* at 962. Noting that the order had not been reduced to writing, and citing

Gregorious, the court of appeals held that "the trial court's decision to allow the State to reopen the evidence was not plain error." *Id.*[10]

Thus, even had defendant's counsel here moved for a directed verdict based on a lack of evidence that defendant did not have a concealed weapons permit, the State could have "properly and with little difficulty [ ] moved to reopen and supply the missing evidence." *Lawrence*, 120 Utah at 326, 234 P.2d at 601. As acknowledged by defendant on appeal, Aplt. Brf. at 31-32, he admitted on cross-examination that he did not have and never has had a concealed weapons permit. *See* R. 933: 961. That testimony was, in fact, consistent with defendant's position throughout the proceedings. *See, e.g.*, R. 297 (alleging that no permit was required to possess a firearm on place of residence or business); R. 332 (same); R. 486 (same); R. 513-14 (contending that it is legal to carry a concealed firearm at your residence, property, or business and summarizing the State's burden as threefold: (1) that the firearm was concealed, (2) that a crime was committed before defendant exposed the firearm, and (3) that the firearm was exposed "from a hiding place to a position of assault at the very

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[10]*See also McNair v. Hayward*, 666 P.2d 321, 324 (Utah 1983) (suggesting that prosecutor could have moved to reopen the case and recall the witnesses to clarify the 17-day discrepancy as to when the thefts occurred). Other jurisdictions have also acknowledged that the State may reopen its case to meet an insufficiency challenge. *See, e.g.*, *Barnett v. State*, 244 Ga.App. 585, 587 n.2, 536 S.E.2d 263, 267 n.2 (Ga. App. 2000) (observing that "it is well settled that a trial court has discretion to reopen the evidence after the State has rested and the defendant has moved for a directed verdict"), *cert. denied* (Jan 5, 2001); *People v. Whipple*, 734 N.Y.S.2d 549, 553 (N.Y. App. 2001) (holding that "where . . . the missing element is simple to prove and not seriously contested, and reopening the case does not unduly prejudice the defense, a court may, in its discretion, grant a motion to reopen"); *State v. Howard*, 320 N.C. 718, 724, 360 S.E.2d 790, 794 (N.C. 1987) (holding that "[t]he trial judge has the discretionary power to permit the introduction of additional evidence after a party has rested its case, and can reopen a case for additional testimony after arguments to the jury have begun").

moment of exposure"). Because defendant had implicitly admitted to not having the permit, the State reasonably assumed that the matter was not disputed. *See Lawrence*, 120 Utah at 327, 234 P.2d at 601 (in holding that the trial court erred in taking judicial notice regarding the value of the stolen car, the Court observed that it "was not a case where the defendant either expressly or impliedly admitted the value, nor by conduct or statements of himself or counsel, allowed it to be assumed that the matter was not disputed"). Had defendant suddenly disputed that fact by filing a motion for a directed verdict, that motion would have inevitably been followed by a motion to reopen the case for the admission of evidence that defendant did not have the required permit. Accordingly, any failure by defense counsel to move for a directed verdict was not prejudicial.

In any event, this Court will "not countenance an argument that turns on a defendant having lost the opportunity to take a position at trial not consistent with the truth." *See State v. Lavadour*, 2001 UT App 328 n.1 (memorandum decision) (reproduced in Addendum B). Therefore, where defendant had implicitly conceded throughout the proceedings that he did not have a concealed weapons permits, and chose not to dispute that fact at trial, but rather to admit it, he cannot complain on appeal that his counsel failed to take a position inconsistent with both the truth and his strategic decision not to dispute the fact. *See also Strickland*, 466 U.S. at 689, 104 S.Ct. at 2065 (holding that "defendant must overcome the

presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'") (citations omitted).[11]

CONCLUSION

For the foregoing reasons, the State respectfully requests the Court to affirm defendant's convictions.

Respectfully submitted this 27th day of August, 2002.

MARK L. SHURTLEFF
UTAH ATTORNEY GENERAL

JEFFREY S. GRAY
ASSISTANT ATTORNEY GENERAL
Attorneys for Appellee

[11]Moreover, it is far from clear that the State is required to produce evidence that a defendant does not have a concealed weapons permit where the defendant never claims to have a permit. *See, e.g., State v. Bowdry*, 337 N.W.2d 216, 218-19 (Iowa 1983) (concluding that "where no demand for a permit is made at the scene and no permit is produced there or at trial, the issue of a permit is not in the case unless substantial evidence appears in the record from some quarter—that the person had a valid permit at the time"). Indeed, the permit issue is more appropriately treated as an affirmative defense requiring the defendant to first raise the issue.

CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of August, 2002, I served two copies of the attached Brief of Appellee upon the defendant/appellant, NORM SMITH, by causing them to be delivered via first class mail, postage prepaid, to his/her counsel of record, as follows:

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Jeffrey S. Gray
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ADDENDA

Addendum A

U.S. Const. amend. VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

Utah Code Ann. § 76-1-402 (3) (1995)

(3) A defendant may be convicted of an offense included in the offense charged but may not be convicted of both the offense charged and the included offense. An offense is so included when:

(a) It is established by proof of the same or less than all the facts required to establish the commission of the offense charged; or

(b) It constitutes an attempt, solicitation, conspiracy, or form of preparation to commit the offense charged or an offense otherwise included therein; or

(c) It is specifically designated by a statute as a lesser included offense.

Utah Code Ann. § 76-10-504 (Supp. 1995)

(1) Except as provided in Section 76-10-503 and in Subsections (2) and (3):

(a) a person who carries a concealed dangerous weapon which is not a firearm on his person or one that is readily accessible for immediate use which is not securely encased, as defined in this part, in a place other than his residence, property, or business under his control is guilty of a class B misdemeanor.

(b) a person without a valid concealed firearm permit who carries a concealed dangerous weapon which is a firearm and that contains no ammunition is guilty of a class B misdemeanor, but if the firearm contains ammunition the person is guilty of a class A misdemeanor.

(2) . . . ;

(3) If the concealed firearm is used in the commission of a violent felony as defined in Section 76-10-501, and the person is a party to the offense, the person is guilty of a second degree felony.

(4) . . . .

Utah Code Ann. § 76-10-506 (1995)

Every person, except those persons described in Section 76-10-503, who, not in necessary self defense in the presence of two or more persons, draws or exhibits any dangerous weapon in an angry and threatening manner or unlawfully uses the same in any fight or quarrel is guilty of a class A misdemeanor.

Addendum B

IN THE UTAH COURT OF APPEALS

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State of Utah,

Plaintiff and Appellee,

v.

Jerome M. Lavadour,

Defendant and Appellant.

MEMORANDUM DECISION
(Not For Official Publication)

Case No. 20000989-CA

F I L E D
(November 8, 2001)

2001 UT App 328

Third District, Salt Lake Department
The Honorable Judith S. Atherton

Attorneys: Kent R. Hart, Salt Lake City, for Appellant
Mark L. Shurtleff and Marian Decker, Salt Lake City, for Appellee

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Before Judges Billings, Orme, and Thorne.

ORME, Judge:

Even if we were to hold that appellant's confession was the product of police coercion, we would be unable to escape the conclusion that, due to the strength of other evidence identifying appellant as the robber, the trial court's admission of the confession into evidence was harmless beyond a reasonable doubt. See Arizona v. Fulminante, 499 U.S. 279, 306-312, 111 S. Ct. 1246, 1263-66 (1991).

It was particularly damaging that appellant's two accomplices identified him as one of the two individuals who entered the store and as the one who played the lead role in committing the robbery. Benally's trial testimony was cogent and credible. The fact that Benally and appellant are first cousins dispels any possibility that Benally did not really know appellant and, in the absence of any indication the relationship between the two was strained, substantially undercuts any suggestion that Benally framed an innocent third-party.

In addition, appellant's trial counsel conceded that appellant was in the store attempting to steal beer on the evening in question. In presenting his client's version of the events at trial, defense counsel explained: "All Mr. Lavadour

wanted was beer. He grabbed it. They ran out. Some clerk stepped in the way. He pulled out a cigarette lighter." When these comments are viewed in combination with the testimony of the two store clerks and the testimony of Benally, it becomes clear there was ample evidence to sustain appellant's conviction, completely independent of his confession.[1]

Affirmed.

Gregory K. Orme, Judge

WE CONCUR:

Judith M. Billings, Judge

William A. Thorne, Jr., Judge

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1. Insofar as appellant suggests that but for his confession, events would have taken a completely different course, we note that Benally's and Gonzales's identification of him predated the confession and thus were not in any way tainted by it. If appellant is suggesting that had the confession been suppressed, he would have taken a different tack at trial rather than admit he was at the store trying to steal beer, his argument is highly speculative, especially given Benally's testimony. Moreover, we are unwilling to countenance an argument that turns on a defendant having lost the opportunity to take a position at trial not consistent with the truth.